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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-585

DOUBLEDAY & COMPANY, INC.,

Petitioner,

v.

PAUL BINDRIM,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

MOTION OF ASSOCIATION OF AMERICAN PUBLISHERS, INC. FOR LEAVE TO FILE BRIEF, AS *AMICUS CURIAE*, WITH BRIEF IN SUPPORT OF DOUBLEDAY & COMPANY, INC.

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November 5, 1979

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Association of American Publishers, Inc. ("AAP") hereby respectfully moves this Court, pursuant to Rule 42, for leave to file the brief *amicus curiae* conditionally filed herewith, in support of the Petition of Doubleday & Company, Inc. ("Doubleday") urging reversal of the judgment below. The consent of Doubleday, by its counsel Satterlee & Stephens, has been obtained and filed concurrently with the Clerk of the Court. The consent of counsel for Respond-

ent was requested but refused; however, Respondent's counsel has been sent copies of the annexed brief *amicus curiae* and has had the opportunity to review same.

The AAP

The AAP is a not-for-profit trade association organized under the laws of the State of New York. It is the major national association of publishers, counting among its more than three hundred members most of the nation's leading commercial book publishers as well as many smaller and non-profit publishers. AAP members publish in the aggregate the vast majority of all general, educational and religious books and materials produced in the United States, including works of fiction: novels, short stories and dramatic works.

The Interest of the AAP

The purpose of our annexed brief is to address the particular deleterious effects of the decisions below on the book publishing industry. The AAP has also joined with four other organizations in an *amicus* brief, to which counsel for Respondent consented, filed in support of Doubleday in this action and of the author, Gwen Davis Mitchell ("Mrs. Mitchell"), in her separate Petition for a Writ of Certiorari (*see* No. 79-556, filed October 4, 1979).

At isue in this case is a singularly unsound California decision which effectively rewrites the defamation liability standards which have been applicable to publishers since this Court's decision in *New York Times Co.* v. *Sullivan.*

In awarding both compensatory and punitive damages against Doubleday for its publication of the novel *Touching,* the courts below displayed an unjust and uninformed penchant to ignore not only what investigative steps are available to publishers of novels to insure the accuracy of their authors' representations and warranties, but also what liability standards are constitutionally applicable for the innocent publication of defamatory material. Accordingly, the AAP believes that these decisions have impinged on critical First Amendment freedoms and have severely threatened the essential legal climate, presaged by the *New York Times* case, within which publishers may in good faith produce books on issues of public moment without the chilling fear that they will be subject to crushing punitive and compensatory awards for reasonable exercise of First Amendment rights at the unrestrained discretion of judges or juries.

Desirability of the *Amicus Curiae* Brief

The AAP believes that consideration of its brief *amicus curiae* will be of assistance to the Court in its consideration of the pending Petition, and the important constitutional questions presented therein, in the broader context of their practical impact on the editorial standards and practices of the book publishing industry as well as upon the free exercise of book publishers' First Amendment rights.

Conclusion

The AAP respectfully submits that its motion for leave to file its brief *amicus curiae* conditionally filed herewith urging reversal of the judgment below be granted.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN PUBLISHERS, INC.

The Interest of the AAP

The interest of the Association of American Publishers, Inc. ("AAP") is set forth in our motion for leave to file, *supra* at 2-3.

Introduction

The AAP most respectfully submits that Doubleday & Company, Inc.'s ("Doubleday") Petition for a Writ of Certiorari to the Supreme Court of California should be granted because the refusal of that court to grant the petition for a hearing filed by Doubleday and the author of the novel *Touching,* Gwen Davis Mitchell ("Mrs. Mitchell"), sanctioned both the creation of a chilling, dangerous and unconstitutional standard of review for publishers in public figure libel actions as well as the unprecedented imposition of punitive damages for the publication of what a publisher reasonably believed to be a work of fiction. Accordingly, the decision below[1] impinged upon publishers' First Amendment freedoms and should be reviewed because:

(i) This case presents a significant opportunity, in the context of a ruling on the singularly important issue of fiction and defamation, to clarify the rule of *New York Times Co.* v. *Sullivan*[2] as it applies to the legal obligations of a commercial book publisher. As the trial court determined, Doubleday's conduct in relying upon the written warranties and subsequent oral representations of an estab-

[1] The last written decision in this case was filed by the California Court of Appeal, Second Appellate District, and followed the trial court's written order denying defendants' motion for judgment notwithstanding the jury's verdict. Thereafter Doubleday and Mrs. Mitchell filed a petition for a hearing before the California Supreme Court, which was denied without opinion on July 12, 1979. References to these decisions will be to the Appendices in Doubleday's Petition for a Writ of Certiorari and will be prefaced with the Appendix letter followed by the page number.

[2] 376 U.S. 254 (1966) (hereinafter referred to as "the *New York Times* case," or simply, "*New York Times*").

lished author in no way violates the "actual malice" standard applicable in public figure cases.[3] Accordingly, the Court of Appeal's fabrication of a "duty to investigate," based upon its own incorrect perception of the facts surrounding the licensing of the paperback rights to the novel, in our view ignores the entire rationale of the "actual malice" standard—that a publisher have such knowledge of actual, verifiable facts that its subsequent publication of a contradictory account must be deemed to have been with "actual knowledge" or "reckless disregard" of the true circumstances, so that it may then be said that it published "calculated falsehoods."

(ii) This case also presents a unique opportunity to clarify this Court's standards regarding the imposition of punitive damages in constitutional defamation actions. Thus, even if "actual malice" had been proven in this case (and it clearly was not), punitive damages should not have been permitted because the First Amendment requires that punitive damages not be awarded absent an express finding of *common law malice* (or "ill will") in addition to "actual malice" as defined by this Court. Such a determination was never made, and indeed, could never be made in this case because Doubleday had no indication even of the respondent's *existence* at the time of its publication of what it reasonably considered to be a completely fictional work.

[3] Respondent Bindrim readily acknowledged at trial that he was a "public figure" for purposes of this action.

The decision below dishonored the principles of *New York Times,* reducing its commitment to "uninhibited, robust" debate to a meaningless incantation protecting nothing of substance or value. Unless the Petition is granted, the rule which will otherwise be established by this case will inevitably lead to the kind of self-censorship which is at odds with a free and vigorous press.

In light of this assault, the AAP considers it essential that the Court re-affirm the promise of *New York Times* and declare as matters of constitutional law that: (i) an additional "duty to investigate" cannot be imposed upon publishers of critical fiction who have otherwise relied in good faith upon the warranties and representations conveyed by established authors as to the fictional nature of their works; and (ii) even if "actual malice" were present in a public figure defamation action, a punitive damage award cannot be constitutionally imposed upon a publisher in addition to compensatory damages without a further determination that the material was published with "ill will" under the traditional standards of common law malice.

ARGUMENT

I. Doubleday did not in fact have serious doubts as to the truth of *Touching* and so cannot be held to have acted with actual malice

It has been clear since the 1964 *New York Times* case that the adequacy of a publisher's pre-publication investigatory procedures is not the determinative factor in deciding whether it has acted with the "actual malice" constitutionally prerequisite to an imposition of compensatory dam-

ages. Thus, in *New York Times,* this Court reversed the Alabama courts' award of damages in a libel action despite the fact that the *Times* had material in its own files that would have shown several of the statements it published in an advertisement to be false.[4] Rather, the Court in *New York Times* focused on the publisher's *subjective* awareness of the facts at the time of publication and so developed the "actual malice" standard under which liability could be imposed in public officials' libel actions only if material was published "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 280.

In *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967), the Court appeared to have modified the standard for publisher liability in public figure defamation cases when it held:

> [A] "public figure" who is not a public official may . . . recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, *on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.* (Emphasis added.)

However, in *St. Amant* v. *Thompson,* 390 U.S. 727, 731 (1968), it became clear that the test of a publisher's liability still hinged on his subjective perception of the facts at the time he published:

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. *There must be*

[4] *See* 376 U.S. at 263-64.

sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. (Emphasis added.)[5]

Emphasizing the fact that it is not what a publisher *might* have done to check up on his author, but what he in fact knew, the Court declared in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 332 (1974): "[M]ere proof of failure

[5] It is clear that even if the more demanding standard from the *Curtis Publishing Co.* decision were applicable, Doubleday still satisfied this "responsible publisher" test. While there are no uniform guidelines that define the standards of the book publishing industry with respect to pre-publication review, reasonable norms for such investigations can be extrapolated. In our view, measured by such norms, the procedures Doubleday followed in this case were well within the standards adhered to by responsible publishers within the industry. Not only did Doubleday's Editor-in-Chief explain to Mrs. Mitchell (an established and well-regarded author) at the outset that none of the characters in *Touching* could be identifiable, but he then obtained a written warranty from her to that effect and, having read the manuscript, received her further assurances that none of the characters in the novel resembled living individuals. Finally, when he received a vague demand letter from Bindrim's attorney *after Touching had been published,* Doubleday's editor again inquired of Mrs. Mitchell whether there was any validity to Bindrim's claims and was told for a *third* time that none of the characters was identifiable. No defamation standard of which we are aware—whether the *New York Times* "actual malice" test or any less demanding standard short of strict liability—required Doubleday, or any publisher, to do more when it was dealing with what it reasonably believed to be a work of fiction.

A book publisher cannot check or confirm the accuracy of every assertion made and it certainly cannot guarantee the validity or integrity of every opinion that appears in its publications. Of course, this proposition is all the more true when the work in question is one of fiction, where the publisher *must* then depend upon the reputation and representations of its author because there are no extrinsic "sources" for it to check. To require more of a publisher by way of an additional duty to investigate would, as a practical matter, turn every publisher into an author or every author into a self-publisher. And it would, as a matter of law, violate the *New York Times* principle that a finding of "actual malice" must be based, not on what a publisher could or should have learned, but only on what the publisher in fact knew or recklessly disregarded.

to investigate, without more, cannot establish reckless disregard for the truth."

In contradistinction to these established precedents, the California decision in this case is grounded in the Court of Appeal's perception of what a publisher "should have" done with regard to investigation.[6] Such second-guessing of publishers' decisions, we submit, can never be countenanced because it invites precisely the kind of strict liability standard which has been definitely rejected by this Court for *any* defamation action, even involving *private* figures, but which was in fact imposed by the courts below in this *public figure* action. Instead of following *St. Amant,* California, because of the misperceptions of the Court of Appeal and the inaction of that state's Supreme Court, has thus adopted a "Monday morning quarterback" standard of liability expressly rejected by this Court even for *private* figure defamation (*see Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at 347) and which is notably the *most* restrictive, rather than the constitutionally required *least* restrictive alternative available. *Id.* at 349.

Moreover, the decision below looks not to the publisher's subjective awareness at the time of the publication, but to a subsequent time when the novel was already in distribution. Then, having received a very vague demand letter, Doubleday was found liable (and under a purported *"actual malice"* standard)—even after it had confronted the author with the claims it had received and obtained an unqualified denial of the allegations. Significantly, Doubleday was held liable for not preventing distribution by another publisher, the licensee of *Touching*'s paperback edi-

[6] *See* B 9-10 in Doubleday's Petition for a Writ of Certiorari.

tion—apparently because the court believed Doubleday should have disregarded its author's warranties and assurances and somehow conducted an investigation into the vague and conclusory claims made in the demand letter.[7] Manifestly, even the semblance of a predictable rule of law was lost in this decision.

Despite all the contradictions and misapplications of the constitutional rules applicable to public figure libel cases, the one thread that runs through both the appellate and trial court decisions is that Doubleday did *not* have "actual malice" at the time it published *Touching*.[8] That, we believe should be dispositive of this case and it is that undisputed fact which makes this case an appropriate one to take for consideration and in which to clarify these crucially important constitutional standards.

II. The punitive damage award is constitutionally impermissible because it would be impossible to find that Doubleday published *Touching* with common law malice or ill will

The potential conflict between the First Amendment and the law of defamation has been well recognized by this Court and matched—if not spurred—by a growing percep-

[7] This additional "duty to investigate" imposed by the Court of Appeal, of course, ignores the fact that there are generally no "sources" for a novel of which a publisher would be aware other than what its author had previously disclosed to it. Thus, the "duty to investigate" which the Court of Appeal imposed upon Doubleday is impossible as a practical matter to carry out with regard to what the publisher reasonably believes to be fiction and, additionally, would have the counterproductive effect of creating completely unwarranted antagonisms and distrust between publishers and authors—thereby ultimately stifling creative expression.

[8] *See* B-8 and C-3 in Doubleday's Petition for a Writ of Certiorari.

tion that the traditional concept of punitive damage awards cannot easily be harmonized with our national commitment to the uninhibited exercise of First Amendment freedoms. This Court's recent cases teach that punitive damages in libel actions are disfavored and, at the very least, must be carefully scrutinized because of their potentially chilling effect upon the freedoms of speech and the press recognized in *New York Times*.[9]

The instant case, on the facts outlined above, graphically demonstrates that past qualms over the awarding of punitive damages were not without foundation. Here, after a jury's award of punitive damages had been struck as totally unwarranted by the trial judge, an appellate court, utilizing suspect rationales and misstating the facts of the case, determined that the punitive award should be reinstated not because of any "ill will" by Doubleday toward the respondent, but because the court did not believe that Doubleday had taken every investigative step possibly open to it.[10] Concerns over the "unbridled whim" of the jury in awarding punitive damages pale against this rare but nonetheless disastrous caprice of an appellate court.

Accordingly, we submit that this case presents a most appropriate opportunity for the Court to clarify its rules limiting the availability of punitive damages in constitutional defamation cases and, in so doing, to adopt as a principle of constitutional law the rule that punitive damages

[9] *See also* in another context this Court's recent opinion in International Brotherhood of Electrical Workers v. Foust, 44 U.S.L.W. 4600 (U.S. May 29, 1979), barring the award of punitive damages where other significant interests are at stake.

[10] The facts, of course, prove otherwise. *See* note 5 *supra*.

may not be awarded against a publisher in such actions unless there is the traditional express finding of common law malice or ill will *in addition to* the finding of "actual malice" necessary to support an award of compensatory damages. Experience has proven that any lesser rule undermines this Court's desire to narrow, rather than to expand, the availability of punitive damages in such cases.[11]

From the very outset in the *New York Times* case this Court was at pains to make it clear that a substantial motivation for the development of special rules in constitutional defamation actions was the chilling effect of the imposition of massive damages there permitted by the Alabama courts:

> The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute.
>
> * * *
>
> Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms canont survive. 376 U.S. at 277-78.

In *Curtis Publishing Co.* v. *Butts, supra,* a punitive damage award was affirmed. But even there the Court was careful to note that punitive damages were traditionally limited at common law by the principle we urge herein:

> The usual rule in libel actions, and other state-created tort actions, is that *a higher degree of fault is necessary to sustain a punitive imposition than a compensatory award.*
>
> * * *

[11] *See* note 14 *infra.*

> Moreover, *punitive damages require a finding of "ill will" under general libel law* and it is not unjust that a publisher be forced to pay for the "venting of his spleen" in a manner which does not meet even the minimum standards required for constitutional protection. 388 U.S. at 160-61 (emphasis added).

Thereafter, these concerns led to open condemnation of punitive damages by Justices Marshall and Stewart who argued on constitutional grounds, in *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29 (1971), for outright elimination of the discretion to impose such exemplary awards:

> The manner in which unlimited discretion may be exercised is plainly unpredictable. And the fear of the extensive awards that may be given under the doctrine must necessarily produce the impingement on freedom of the press recognized in *New York Times.*
>
> * * *
>
> The unlimited discretion exercised by juries in awarding punitive . . . damages compounds the problem of self-censorship that necessarily results from the awarding of huge judgments. This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others. Such free wheeling discretion presents obvious and basic threats to society's interest in freedom of the press. And the utility of the discretion in fostering society's interest in protecting individuals from defamation is at best vague and uncertain. These awards are not to compensate victims; they are only windfalls. 403 U.S. at 83-84 (dissenting opinion).[12]

[12] Even if it be accepted that an award of punitive damages will ordinarily have a deterrent effect on others who might otherwise have engaged in similar "antisocial behavior," this rationale cannot justify the award in this case. Here, Doubleday did act as a "responsible publisher" and there simply is nothing else it could have done to

(footnote continued on next page)

Of course, these developing concerns led to the outright elimination, in *Gertz* v. *Robert Welch, Inc., supra,* of punitive damages in all cases where "the private defamation plaintiff establishes liability under a less demanding standard than that stated by *New York Times*. . . ." 418 U.S. at 350.[13] The *Gertz* majority detected a dangerous conflict between awards of punitive damages and the constitutional considerations that underlie *New York Times*:

> In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. *Id.*

Finally, in *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245 (1974), the Court drew a specific distinction between legally implied "actual malice" and the traditional concept of common law malice:

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further insure that *Touching* was a work of fiction (as the trial court so determined). Accordingly, the punitive damages awarded in this case cannot serve a deterrent or even an instructive function; their only effect will be to hinder and suppress the publication of fictional works involving current trends and ideas. Moreover, an award of punitive damages in such unfounded circumstances as are present herein will necessarily create a further incentive toward litigation, inviting the additional danger that speech will be chilled by the mere prospect of expensive legal action.

[13] We are not here arguing, in urging this Court to grant the Petition, that an absolute bar against punitive damages must be adopted. Thus, we are hopeful that a clarification of the need for employing the traditional common law requisites to an exemplary award will be sufficient to avoid the chilling effect on constitutional rights here at issue. It is possible, however, that experience will ultimately demonstrate that an absolute proscription may indeed be necessary and that the rule in *Gertz* should be expanded to bar punitive damages in *New York Times* and all other defamation cases.

> [O]f course, "actual malice" is a term of art, created to provide a convenient shorthand expression for the standard of liability that must be established before a State may constitutionally permit public officials to recover for libel in actions brought against publishers. As such, *it is quite different from the common-law standard of "malice" generally required under state tort law to support an award of punitive damages.* *Id.* at 251-52 (emphasis added) (footnote omitted).

In this case no finding was made, nor could have been made on the facts outlined above, of Doubleday's ill will. Accordingly, the punitive award violates the principles and, until now, the only implicit guidelines of this Court in the cases just reviewed. Simply, this is not a "venting of the spleen" type of case and Doubleday's actions can in no way justify the punitive award here imposed.

We submit that this unjust result proves beyond question that the manner in which a jury (or even an appellate court) may exercise its discretion to severely punish a publishing defendant creates a very real danger of the self-censorship and consequent infringement on freedom of the press that the *New York Times* case and its progeny sought to prevent. It seems clear from this case that the lower courts' current perceptions of what findings are sufficient to justify an award of punitive damages in public figure libel actions is inadequate and that the fruits of this misunderstanding can still have a calamitous effect on the publishing industry even after the *New York Times* cases.[14]

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[14] Trial and appellate courts in a number of recent cases, in which highly suspect punitive damage awards were imposed, appear to have been misled by this Court's ruling in *Gertz, supra.* They

(footnote continued on next page)

We believe that, with the unjust result reached below, the time has come for a reaffirmation of the principles enunciated in *New York Times* so that fact-finders (at whatever judicial level) may not simply pay lip-service to an "actual malice" standard and then proceed to ignore the protections afforded publishers and the press under the First Amendment. Thus, particularly where the threat is to the creative processes involved in the development of critical fiction (where a wide latitude is especially important), further instruction would appear necessary as to exactly what findings are constitutionally necessary to support a finding of liability and imposition of punitive damages against publishers. By taking this case, defining the standards of liability required in actions involving fictional works and confirming that punitive damages may not be awarded absent an additional finding of publisher "ill will," this Court would help to solidify the promise of *New York Times*. We strongly urge that these steps be taken.

(footnote continued from preceding page)

appear to have adopted the erroneous view that traditional state common law standards regarding the prerequisites for punitive damages are no longer applicable in constitutional defamation cases. *See, e.g.*, Maheu v. Hughes Tool Co., 569 F.2d 459 (9th Cir. 1977) (allowing punitive damage awards upon a showing of "actual malice"); Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977) (jury's award of $2 compensatory damages and $125,000 punitive damages under the "actual malice" standard reversed on other grounds); Davis v. Schuchat, 166 U.S. App. D.C. 351, 510 F.2d 731 (1975) (trial court's award of $1 compensatory damages and $1,500 punitive damages under "actual malice" standard affirmed). In taking this approach the lower courts, in our view, are clearly misreading *Gertz*. In consequence, these courts have made it *easier* for juries to impose, and courts to uphold, unjustifiable punitive awards which make a mockery of the proper goal of *Gertz* to constrain punitive damages in constitutional defamation cases. On this ground alone, this Court should grant the Petition for a Writ of Certiorari so as to clarify and effectuate its desire to prevent unjust punitive awards where First Amendment values are implicated.

Conclusion

For all of the foregoing reasons, the Petition should be granted.

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